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2013 IL App (3d) 120130-U

Order filed September 23, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

RUTH ELZER, by and through HENRY)	Appeal from the Circuit Court
ELZER, Guardian of the Estate of)	of the 13th Judicial Circuit,
Ruth Elzer,)	La Salle County, Illinois,
)	
Plaintiff-Appellant,)	
)	
v.)	Appeal No. 3-12-0130
)	Circuit No. 09-L-208
)	
THE LA SALLE COUNTY NURSING HOME,)	Honorable
and COMMUNITY HOSPITAL OF OTTAWA,)	Eugene P. Daugherty,
)	Judge, Presiding.
Defendants-Appellees.)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Wright and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Although the Nursing Home Care Act imposes certain duties on county nursing homes, it does not supercede the Illinois Local Government and Governmental Employees Tort Immunity Act. Thus, county nursing homes are entitled to assert any applicable provisions of the Tort Immunity Act as a defense to liability for claims of negligence or for violations of their duties under the Nursing Home Act; (2) Because the appellant did not argue specifically that sections 2-204, 2-109, and 6-107 of the Tort Immunity Act did not apply to bar the claims at issue, the court would not address any such arguments *sua sponte*.

¶ 2 Plaintiff Ruth Elzer (Ruth) is a resident at the La Salle County Nursing Home in Ottawa, Illinois (the Home). Her guardian, Henry Elzer, sued the Home, seeking to recover for injuries that were allegedly inflicted upon Ruth by another resident at the Home. The second and third amended complaints included a claim under the Nursing Home Care Act (the Act) (210 ILCS 45/1 *et seq.* (West 2008)) and a claim for common law negligence. The Home moved to dismiss these claims, arguing that the Home was immune for liability under various sections of the Illinois Local Government and Governmental Employees Tort Immunity Act (the Tort Immunity Act) (745 ILCS 10/1-101 *et seq.* (West 2008)). The circuit court granted the Home's motion and dismissed Ruth's negligence claim and her claim under the Act. Ruth subsequently filed a motion to voluntarily dismiss her remaining claims, which the circuit court granted. This appeal followed.

¶ 3 FACTS

¶ 4 Ruth has been a resident of the Home since 1999. In October 2009, Henry Elzer, Ruth's guardian, filed a complaint on her behalf in the circuit court of La Salle County. The complaint alleged that, on June 5, 2009, Ruth suffered a fracture of her "pubic/pelvic bone" and experienced mental suffering when another resident of the Home had physical contact with her. Count I of the second amended complaint alleged that the Home violated various duties under the Act. Count II asserted a claim against the Home for common law negligence.¹ On May 4, 2010, Ruth filed an amended complaint which added a count for breach of contract. On September 23, 2010,

¹ The complaint additionally sought damages against the Home and against the Community Hospital of Ottawa for other incidents. These counts are not at issue in this appeal.

Ruth filed a second amended complaint which made other changes. Neither of these amendments affected any of the allegations in Counts I and II.

¶ 5 The Home moved to dismiss Counts I and II of the second amended complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2–619(a)(9) (West 2010)), arguing that the Home was immune for liability under various sections of the Tort Immunity Act. Specifically, the Home argued that Ruth's claims were barred by section 2-204 of the Tort Immunity Act (745 ILCS 10/2-204 (West 2008)), which immunizes public employees from liability for injuries "caused by the act or omission of another person," and section 2-109 of the Tort Immunity Act (745 ILCS 10/2-109 (West 2008)), which provides that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." In addition, the Home argued that, to the extent Ruth sought to recover for the Home's alleged failure to supervise the resident who injured Ruth, her claims were also barred by section 3-108 of the Tort Immunity Act (745 ILCS 10/3-108) (West 2008)).

¶ 6 On November 18, 2010, circuit court Judge James Lanuti granted the Home's amended motion to dismiss and dismissed counts I and II of the claimant's third amended complaint. In so ruling, the circuit court held that, while the Home owed certain duties under the Act, as a local public entity, it was entitled to assert any applicable immunity provisions under the Tort Immunity Act. After considering the immunity provisions raised by the Home and the arguments of the parties, the circuit court held that section 2-204 of the Tort Immunity Act barred the claims asserted in counts I and II of the third amended complaint. However, during the hearing on the Home's motion to dismiss, the circuit court suggested that Ruth might avoid the application of section 2-204 under a provision of the Act that was not mentioned in the third amended

complaint. Specifically, the court noted that section 3-612 of the Act (210 ILCS 45/3-612) imposes certain obligations on a nursing home in the event of a credible report of abuse by one nursing home resident against another. Accordingly, the circuit court granted Ruth leave to amend her complaint again to add a claim under that section of the Act.

¶ 7 Ruth filed a third amended complaint, which realleged the previously-dismissed counts and added allegations under section 3-612 of the Act. Circuit court Judge Eugene Daugherty found that Judge Lanuti's prior order dismissing counts I and II of the third amended complaint was the law of the case with respect to those counts. In addition, Judge Daugherty held that the newly-pled allegations under section 3-612 of the Act were barred by section 6-107 of the Tort Immunity Act (745 ILCS 10/6-107) (West 2008)), which immunizes local public entities and employees from liability for injuries resulting from certain determinations made by such entities or employees relating to the confinement or release of persons for mental illness or addiction. The circuit court held that section 6-107 barred recovery because it found that Ruth was seeking to recover under section 3-612 of the Act based on the Home's failure to confine the resident who allegedly injured her.

¶ 8 Ruth later moved to voluntarily dismiss the remaining counts of her third amended complaint with prejudice. The trial court granted that motion and, pursuant to Illinois Supreme Court Rule 304(a), found that its order was a final judgment with no just reason for delaying enforcement or appeal of the judgment. This appeal followed.

¶ 10 We review *de novo* a circuit court's dismissal of a claim under section 2-619(a)(9) of the Code on the ground that the defendant is immune under the Tort Immunity Act. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997).

¶ 11 As noted, the circuit court dismissed counts I and II of Ruth's third amended complaint because it held that the claims raised in those counts were barred by sections 2-204, 2-109, and 6-107 of the Tort Immunity Act. However, Ruth's brief on appeal addresses none of these particular sections of the Tort Immunity Act. Instead, Ruth makes a much broader argument. Specifically, she claims that the Act "supercedes" the Tort Immunity Act. In essence, Ruth argues that the Tort Immunity Act cannot immunize the Home from liability because county nursing homes like the Home are included within the definition of a "facility" covered by the Act and therefore fall within the Act's regulatory requirements. Therefore, Ruth reasons, the Home is liable for any violations of the Act's requirements (such as abuse or neglect of its residents), and the Tort Immunity Act provides no bar to recovery.

¶ 12 We disagree. As the Home notes, Ruth appears to conflate the concept of duty with the concept of immunity. These are two separate concepts that must be addressed separately. *Harris v. Thompson*, 2012 IL 112525, ¶ 17. Once a court determines that a duty is imposed on a local public entity by statute or common law, it must then address whether a provision of the Tort Immunity Act applies to bar some or all of the claims. *Id.*; *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370 (1997) (applying Tort Immunity Act to claims brought pursuant to the Structural Work Act). Accordingly, although the Act unquestionably imposes certain duties on

the Home, alleging these duties does not end the inquiry. Rather, a court must still determine whether a provision of the Tort Immunity Act applies.

¶ 13 The authorities cited by Ruth do not support the proposition that the Act "supercedes" the Tort Immunity Act, and the Act contains no provision suggesting that the Tort Immunity Act is without effect in suits brought against county nursing homes under the Act. Moreover, although the legislature has expressly excluded certain actions from the reach of the Tort Immunity Act, including contract actions and actions brought under the Workers' Compensation Act, the Workers' Occupational Disease Act, and several others, actions brought under the Act are not among them. 745 ILCS 10/2-101(a)-(f) (West 2010). Further, applying the Tort Immunity Act to claims brought under the Act promotes the purpose of the Tort Immunity Act, which is to protect local public entities and their employees from tort liability arising out of their government operations and to prevent public funds from being used to satisfy damage claims in such cases. See 745 ILCS 10/1-101.1 (West 2010); *Harris*, 2012 IL 112525, ¶ 17. Thus, Ruth's contention that the Act "supercedes" the Tort Immunity Act is without merit.²

² In her brief on appeal, Ruth suggests in passing that section 6-106 of the Tort Immunity Act somehow supports her argument that the Tort Liability Act does not apply to claims brought under the Act. That section provides that "[n]either a local public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addiction or from failing to prescribe for mental or physical illness or addiction." 745 ILCS 10/6-106(a) (West 2008). Subsection d provides an exception to the immunity conferred by subsection a, noting that "[n]othing in this section exonerates a public employee from liability for injury proximately

¶ 14 As noted, in her brief on appeal, Ruth raised only the general argument that the Act supercedes the Tort Immunity Act. She did not argue that sections 2-204, 2-109, and 6-107 of the Tort Immunity Act, in particular, are inapplicable or otherwise ineffective to confer immunity in this case. We will not consider any such arguments *sua sponte*. As our supreme court has noted, "Illinois law is well settled that other than for assessing subject matter jurisdiction, a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment." *People v. Givens*, 237 Ill. 2d 311, 323 (2010). "In our adversary system, *** we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* Our adversary system is "designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* at 324 (citation and internal quotation marks omitted). Thus, as the supreme court aptly put it:

"[w]hile a reviewing court has the power to raise unbriefed issues pursuant to Supreme Court Rule 366(a)(5), we must refrain from

caused by his negligent or wrongful act or omission in administering any treatment prescribed for mental or physical illness or addiction or exonerates a local public entity whose employee, while acting in the scope of his employment, so causes such an injury." 745 ILCS 10/6-106(d) (West 2008). However, the Home never raised, nor did the circuit court consider, section 6-106 or its application to Ruth's claims. Because the Home has not raised it, Ruth's citation to section 6-106(d) as an exception to section 6-106(a) is inapposite.

doing so when it would have the effect of transforming this court's role from that of jurist to advocate. [Citation.] Were we to address these unbriefed issues, we would be forced to speculate as to the arguments that the parties might have presented had these issues been properly raised before this court. To engage in such speculation would only cause further injustice; thus we refrain from addressing these issues *sua sponte*."

Id. (quoting *People v. Rodriguez*, 336 Ill. App. 3d 1, 14 (2002)).

As noted, Ruth did not address the applicability of sections 2-204, 2-109, or 6-107 of the Tort Immunity Act in her brief on appeal. When the Home argued in its appellee's brief that those sections bar Ruth's claims, Ruth did not file a reply brief rebutting the Home's arguments.

Instead, she chose to rest on her initial argument that the Act supercedes the Tort Immunity Act. We cannot know why Ruth made that choice. Perhaps she felt that she had no strong arguments to rebut the Home's claim that sections 2-204, 2-109, and 6-107 barred her claims. Perhaps her decision was motivated by some other reason. Regardless, we will not act as Ruth's advocate by speculating as to arguments that she might have made (but chose not to make) on those issues.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, we affirm the judgment of the La Salle County circuit court.

¶ 17 Affirmed.